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Supreme Court of the United States

OCTOBER TERM, 1992

VIRGINIA MILITARY INSTITUTE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

BRIEF AMICI CURIAE ON BEHALF OF
WOMEN'S WASHINGTON ISSUES NETWORK,
WOMEN FOR VMI, FRANK F. HAYDEN AND
OSCAR W. KING, III IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the single-sex admissions policy of a state-supported college that substantially furthers important government educational interests nonetheless violates the Equal Protection Clause if the State fails to establish and operate an identical single-sex college for the other sex.

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INTEREST OF *AMICI CURIAE**

Women's Washington Issues Network ("Women-WIN") is a non-profit corporation founded by women to foster interaction among, and professional development of, women and men who support the basic tenets of limited government, individual responsibility and economic rights.

Women for VMI is an unincorporated association of women who support the option of single-sex education generally and also the educational philosophy of the Virginia Military Institute ("VMI") as an important educational al-

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* Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

ternative for young men. Many members of Women for VMI are personally aware of the effectiveness and value of VMI's educational program because they have sons, fathers, brothers or other family members and acquaintances who were graduated from VMI or who are presently VMI cadets.

Together, these *amici* represent more than 5,000 individuals, of whom approximately 3,200 are Virginians. More than 1,200 of these individuals were educated at single-sex colleges or secondary schools, or both, and approximately 475 were graduated from all-women's colleges in Virginia.

Frank F. Hayden is former president of the Detroit Board of Education and was the chairman of the board committee that recommended the establishment of three all-male academies, discussed *infra* pages 17-18, after studying the academic performance and disciplinary problems of urban male students. The plans for the all-male academies were abandoned as a result of a lawsuit raising a constitutional challenge identical to that brought against VMI.

Oscar W. King, III is past chairman of the board of directors of the Detroit Urban League and a graduate of Howard University and Harvard University, where he earned a masters degree in urban and land economics. He has taught at Harvard, the University of Detroit, and Wayne State University. As a concerned citizen and parent, Mr. King is a strong supporter of central city all-male academies.

Amici believe that coeducational institutions are an important element in achieving a State's education mission. But single-sex educational opportunities constitute a valuable alternative to coeducational programs, and *amici* believe that the Constitution does not require that States limit their educational menu exclusively to coeducation. Options such as single-sex education may constitutionally be tailored to respond to the distinctive needs of each sex and need not be offered on identical terms to both sexes.

Different levels of interest among males and females as well as other differences between the sexes may be considered and accommodated in designing suitable and successful educational alternatives.

Single-sex education should continue to remain eligible for the receipt of public support so that this valuable educational option may remain available for the benefit of young women and men of various means, not just those who can afford a single-sex private education without public financial assistance.

Amici are filing this brief in support of VMI's petition for writ of certiorari because the court of appeals' decision calls into question the constitutional validity of a State's support for *any* single-sex public educational program that is not provided on an identical basis to both sexes, even if a particular program is substantially related to the fulfillment of important government objectives and there is minimal interest in that particular program by members of the other sex. Because the decision below apparently requires States to provide educational assistance in precisely equivalent terms to each sex, regardless of differences in interest or need, it calls into question all direct or indirect public assistance to single-sex programs, including private schools and other governmental programs or services that may be oriented toward or provided to only one sex (*e.g.*, rape crisis centers). Unless reviewed by this Court, the decision below will stand as a formidable and discouraging barrier to efforts by States to serve the individualized needs of both women and men and to experimentation by the States with creative responses to educational and other citizen needs.

BACKGROUND STATEMENT

A. Virginia's Higher Education System

VMI is one of eighty-two colleges and universities in Virginia's outstanding system of public and private higher education. See Center For Public Service, *Virginia Statistical Abstract* 170-71 (1992). These diverse institutions

offer a "great array" of educational settings from which students may choose. See *Commission On The University Of The 21st Century, The Case For Change* 14 (1990); Pet. App. 49a. The choices range from two-year to four-year programs, liberal arts to highly specialized curricula, and include research and teaching environments, commuter and residential campuses, urban and rural settings, and opportunities for full-time and part-time students. See Pet. App. 50a; *Commission On The University Of The 21st Century, supra*, at 14; Center For Public Service, *supra*, at 170-71. Each institution in the system has its own distinctive educational mission. Taken as a whole, the system responds effectively to the demand among students for a wide variety of learning environments.

Virginia has fostered its diversity of higher educational opportunity primarily in two ways. First, the governance of Virginia's public colleges and universities is highly decentralized. The General Assembly has delegated authority to define educational objectives and admissions criteria to a board of visitors for each respective institution. Pet. App. 6a. Each board of visitors is given a high degree of autonomy. Pet. App. 18a, 49a-50a. Thus, each college and university has more flexibility to "demonstrate creativity" and "take risks" with different educational philosophies and approaches. See *Commission On The University Of The 21st Century, supra*, at 14.

Second, Virginia has promoted private higher education by providing millions of dollars in aid to students attending private colleges and universities.¹ For example, Virginia provided over \$5 million in grants to students attending the six private single-sex institutions in Virginia during

¹ Acting pursuant to explicit authorization in the Virginia Constitution, see Va. Const. art. VIII, § 11, the General Assembly has provided for loans, grants and scholarships to students attending nonprofit private colleges and universities. See Va. Code Ann. §§ 23-38.11 to -38.44:3 (Michie 1985 & Supp. 1992) (Tuition Assistance Grant Act); Va. Code Ann. §§ 23-38.45 to -38.50 (Michie 1985 & Supp. 1992) (College Scholarship Assistance Act); Va. Code Ann. §§ 23-38.53:1 to -38.53.3 (Michie 1985 & Supp. 1992) (Virginia Scholars Program).

the 1989-90 biennium. William A. DeVan, Note, *Toward a New Standard in Gender Discrimination: The Case of Virginia Military Institute*, 33 Wm. & Mary L. Rev. 489, 500 n.71 (1992). Through these grants, as well as other forms of government assistance (including student loans, scholarships, work-study programs, information resources, and technological and planning support), Virginia has recognized and encouraged the contributions of Virginia's independent colleges and universities to the breadth of the Commonwealth's higher education system. Indeed, Virginia utilizes both public and private institutions to fulfill the important governmental function of providing its citizens with access to diverse higher education programming. See *Commission On The University Of The 21st Century, supra*, at 14; Pet. App. 53a.

This case involves only one component of Virginia's diverse higher education system, and it is important to evaluate VMI's status and policies in that context. There are currently seven undergraduate institutions in Virginia that offer single-sex education, five of which are private all-women's colleges,² one of which is a private all-men's college,³ and one of which is VMI. Although the single-sex institutions have curricula⁴ and other characteristics⁵ com-

² Hollins College, Mary Baldwin College, Randolph-Macon Women's College, and Sweet Briar College, all of which offer four-year degrees, and Southern Virginia College for Women (formerly Southern Seminary College), which offers a two-year education. Pet. App. 51a.

³ Hampden-Sydney College, which offers four-year degrees. Pet. App. 51a.

⁴ All of the majors offered at VMI are also available at the four-year all-women's colleges, which have arts and science majors identical to those offered at VMI and have cooperative arrangements with other institutions for students to earn the engineering degrees available at VMI. VMI, however, does not offer many of the majors that are available at all-women's colleges (for example, degrees in biochemistry, philosophy and political science/government). See *Peterson's Guide to Four-Year Colleges* 516, 615, 756, 873 (23d ed. 1993); see also *infra* note 6.

⁵ For example, students at sixteen public coeducational institutions, as well three private all-women's colleges, may join the Army Reserve

parable to other institutions within the Commonwealth, each of the single-sex colleges has characteristics aside from its admissions policy that differentiate it from the other institutions in Virginia's higher education marketplace.⁶ Single-sex colleges therefore contribute significantly to the diversity of educational opportunities within the Commonwealth.

B. The Virginia Military Institute

VMI was founded in 1839 as the nation's first state military college. Today it retains its military character and is recognized for the contributions of its alumni to the national security. However, unlike the Nation's military service academies, VMI does not regard the training of military officers as its principal educational objective. Pet. App. 67a, 78a.⁷ Rather, VMI uses military discipline as a pedagogical tool in its unique system for the education and development of its students. Pet. App. 61a, 67a.

VMI has continuously refined and improved its educational approach since its founding. It focuses on the maturation and transition of young men from adolescence to productive careers and adult lives. VMI provides an opportunity to achieve success through discipline and hard

Officer Training Corps. See *Peterson's Guide to Four-Year Colleges*, *supra*, at 226, 615, 756, 873.

⁶ For example, Mary Baldwin is the only single-sex college offering degrees in accounting, advertising, arts administration, Asian/Oriental studies, health services administration and journalism. See *Peterson's Guide to Four-Year Colleges*, *supra*, at 615. Degrees in archeology, film studies and statistics are available only at Hollins College. See *id.*, at 516. Sweet Briar is the only single-sex institution offering degrees in ecology/environmental studies, European studies, Hispanic studies and Italian. See *id.*, at 873.

⁷ Unlike graduates of the national academies, VMI cadets are not automatically offered military commissions upon graduation. *Virginia Military Institute 1990-91 Catalogue* 12. Seventy percent of those offered commissions do accept, but only eighteen percent of the average graduating class go on to become career military officers. See DeVan, *supra*, at 536 & nn. 326, 327. Also, VMI generally attracts students who have not applied to West Point. Pet. App. 90a.

work, particularly for young men from less-advantaged economic backgrounds, for whom such an opportunity would be unattainable if VMI were not publicly supported.⁸

VMI has learned that for some young men, it is highly beneficial to be educated in a structured, physically rigorous and disciplined single-sex environment during the awkward and stressful period of adolescence. VMI accordingly developed an educational program in a military-style "adversative" environment as an effective means by which to condition the passage through adolescence to adulthood and to inculcate constructive attitudes and self-esteem.

The success of the VMI system depends on a high level of regimentation, intense physical stress, the absence of privacy and personal time, minimal opportunities for distractions from the educational mission, a focus on interdependence and bonding, and exceedingly high, uniform standards of conduct and achievement. Pet. App. 7a, 54a, 96a. The VMI educational model therefore involves rigorously egalitarian treatment of students. Pet. App. 59a, 94a. Every effort is made to subordinate physical and material distinctions among cadets. Every student must wear a uniform and live in standardized, Spartan barracks where he is subjected to the stress of constant scrutiny. Every cadet is required to attain equal levels of physical fitness and is held to identical disciplinary standards and to a strict, inflexible code of conduct that includes an uncompromising honor system.

Although the VMI system is not suitable for all young men, and does not appear to be compatible with the somewhat different developmental needs of most young women, Pet. App. 82a-83a, it has proven quite successful for many

⁸ Francis H. Smith, the first Superintendent and a cofounder of VMI, viewed VMI's mission as to provide educational opportunities to working and middle class males. Henry A. Wise, *Drawing Out the Man: The VMI Story* 13 (1978). Today, more than seventy percent of the cadet corps receives financial aid. *Peterson's Guide to Four-Year Colleges*, *supra*, at 2602. In addition, VMI places particular emphasis on the recruitment and retention of minority students. Pet. App. 87a-88a.

young men where other, more permissive, environments are not. Its "success and reputation are uncontroverted." Pet. App. 5a.

An irony of VMI's homogenized treatment of cadets is that it inspires young men to believe in a motto, inscribed in stone on the main arch at VMI, that promises that "you may be whatever you resolve to be." It creates the opportunity and incentive for a student to distinguish himself from others by developing individuality and inner strengths and abilities. VMI's uniform standards preclude cadets from privileged backgrounds from relying on social status or other advantages to achieve recognition at VMI, while permitting cadets from less advantaged or less distinguished backgrounds to prove themselves solely on their individual merit and effort.⁹

C. VMI's Status As The Only Public Single-Sex College In Virginia

The court of appeals' ruling against VMI is based largely on the fact that VMI is "unique" and the only public all-men's college in a State where there are no public all-women's colleges. VMI occupies this status, however, not because of any decision by the Commonwealth to deny single-sex education to women or any "long-standing discriminatory policy." Pet. App. 39a n.10. Rather, VMI is the only public single-sex college in Virginia because of independent, unilateral judgments by the boards of visitors at the four public formerly all-women's colleges, Pet. App. 52a,¹⁰ which converted to coeducational admissions policies, as did many institutions across the Nation, based on changing student demand and related economic factors. The transition to coeducational admission policies was also driven by the perception of some educators that publicly funded single-sex education necessarily contravenes the

⁹ VMI's distinguished alumni include Secretary of State and General George C. Marshall and United States Supreme Court Justice Thomas Campbell Clark.

¹⁰ Longwood College, Mary Washington College, Radford College, and Madison College. Pet. App. 39a, 48a-49a.

Equal Protection Clause.¹¹ As a result, the opportunities for both women and men to obtain post-secondary single-sex education assisted by public resources has dramatically diminished. There are only two public all-women's colleges remaining in the Nation today.¹²

VMI reviewed its mission and its admissions policy in light of the decisions by Virginia's public women's colleges to become coeducational and this Court's decision in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Pet. App. 68a-69a. After a three-year study, an independent committee appointed to study these issues by VMI's Board of Visitors concluded that VMI's adversative model is highly beneficial for educating its students and that the continuation of a single-sex environment is vital to VMI's success. Pet. App. 68a-69b, 72a-74a. The VMI Board of Visitors accordingly determined not to change its unique and indisputably successful educational system. *Id.*

If VMI's admissions policy is deemed to violate the Equal Protection Clause because of the absence of an equivalent women's college that apparently is neither suitable for nor desired by substantial numbers of women, then public single-sex education will surely disappear, not just in Virginia, but throughout the Nation. But if the VMI system is upheld, any of Virginia's formerly single-sex public institutions will be free to reconsider their admissions policies at any time and to reestablish single-sex programs tailored specifically to the educational needs of young women.¹³

¹¹ See, e.g., Marcia Berman, Comment, *An Equal Protection Analysis of Public and Private All-Male Military Schools*, 1991 U. Chi. Legal F. 211.

¹² These institutions are Douglass College of Rutgers University and Texas Women's University. See Pet. App. 52a. The Citadel is the only remaining public all-men's college other than VMI. See *id.*

¹³ At Longwood College, sixty-seven percent of the student body are now women, *Peterson's Guide to Four-Year Colleges*, *supra*, at 593; Mary Washington College has sixty-five percent women's enrollment, *id.*, at 619; and sixty-three percent of the students at Radford University (formerly Radford College) are women, *id.*, at 754.

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeals' Decision Suggests That A Single-Sex Educational Program Substantially Related To Important Government Objectives Must Be Provided On An Identical Basis To Both Sexes.

The decision below establishes a new and unwarranted standard for the review of educational services that are provided by the government on a single-sex basis. Gender-based distinctions in government programs should be reviewed under the intermediate scrutiny test first articulated in *Craig v. Boren*, 429 U.S. 190 (1976), and implemented to determine the constitutionality of a single-sex institution of higher learning in *Hogan*. Under this test, a public college or university can maintain a single-sex admissions policy if it "serves 'important governmental objectives'" and is "'substantially related to the achievement of those objectives.'" *Hogan*, 458 U.S., at 724 (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)), provided the policy is applied in a manner free of stereotypical notions of the "roles and abilities of males and females," *Hogan*, 458 U.S., at 725.

Although the court below purported to apply the same intermediate scrutiny test approved by this Court in *Hogan*, it actually imposed a separate, virtually insurmountable, standard of constitutional scrutiny. It affirmed the district court's findings that single-sex education at VMI "is justified by a legitimate and relevant institutional mission," Pet. App. 20a, and it agreed with the district court that the VMI educational model is not based upon impermissible stereotyping or overly broad generalizations, Pet. App. 14-15a. The court of appeals also affirmed the district court's findings that "VMI's unique methodology justifies a single-gender policy," Pet. App. 4a, and that "material aspects of its essentially holistic system would be substantially changed by coeducation," *id.*¹⁴ And the court of

¹⁴ Specifically, the court of appeals found adequate support in the record for the district court's findings that "at least three aspects of

appeals found adequate support in the record for the district court's conclusion that "changes necessary to accommodate coeducation [at VMI] would tear at the fabric of VMI's unique methodology." Pet. App. 14a. Thus, the court below concluded that a decision to require the admission of women to VMI "would deny those women the very opportunity they sought because the unique characteristics of VMI would be destroyed by coeducation." Pet. App. 14a.

The court of appeals nevertheless held that VMI's entirely appropriate means to an important and legitimate objective was unlawful because it was not accompanied by an identical opportunity for the excluded sex. The court held that Virginia could not overcome an Equal Protection Clause challenge, despite the legitimacy of its goal and means, unless it could justify affording "VMI's unique type of program to men and not to women." Pet. App. 5a (emphasis added). While the court used the phrase "parallel institutions or parallel programs," Pet. App. 21a, the court clearly meant that Virginia would have to afford to women VMI's "unique educational opportunity," Pet. App. 5a, that is, "an all-female program with the same mission and methodology as that of VMI." Pet. App. 17a (emphasis added).¹⁵

This requirement of an all-female institutional equivalent to VMI adds a burden not required by *Hogan*. According to the court below, the Commonwealth must offer its programs in precisely equivalent terms to both sexes or establish in some fashion that an "important policy . . . substantially supports offering" any such program to one sex but not the other. Pet. App. 21a. This standard imposes an impractical, nonsensical burden on Virginia that

VMI's program—physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training." Pet. App. 14a.

¹⁵ See also the court's references to "the same kind of rigorous military training as . . . VMI," Pet. App. 18a, and the "unique benefit of VMI's type of education and training," *id.*

is destructive to legitimate state policies.¹⁶ And the decision below inevitably will be understood to stand for the proposition that *any* government single-gender program not provided on an identical basis to both sexes is *per se* unconstitutional.

Amici submit that the Equal Protection Clause requires only that a State provide generally comparable access for women and men to government services, and that those opportunities may be evaluated in light of the relative demands and needs of each gender for a particular service.¹⁷ The States therefore have flexibility under the Constitution to experiment with the provision of particular educational programs that accommodate the differing needs of women and men. Thus, if a single-sex program serves important government objectives, and the exclusion of one gender from a particular program is substantially related to those objectives, both of which standards are readily met by VMI, then the State should not be required to

¹⁶ Virginia already provides women the opportunity to be educated in a four-year undergraduate residential cadet program at a public institution, Virginia Polytechnic Institute ("Virginia Tech")—one of only four such programs for women in the entire Nation. Pet. App. 88a. The Virginia Tech program, however, does not appear to satisfy the court of appeals' "parallel program" requirement because, unlike VMI, Virginia Tech is not single-sex and does not employ the adversative educational model. Thus, the court of appeals' reasoning appears to mandate as a remedy the establishment of an all-women's adversative educational program identical to VMI.

¹⁷ See *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469 (1981) ("[B]ecause the Equal Protection Clause does not demand that a statute necessarily apply equally to all persons or require things which are different in fact . . . to be treated in law as though they were the same, this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances") (citations and internal quotation marks omitted); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (upholding statute allowing women a longer period than men to earn a Navy promotion necessary to avoid mandatory discharge, because combat restrictions resulted in women having fewer opportunities to distinguish themselves professionally).

provide, or to justify not providing, an identical program to members of the excluded sex.

The decision below and the unworkable Equal Protection Clause standard that it promulgates is predicated upon three faulty premises: First, it assumed without any factual basis, and contrary to the findings in the record, that there was a demand among women for an all-women's military institute modeled after VMI sufficient to sustain a viable institution. But the record shows there is no substantial demand for an all-women's VMI. *See* Pet. at 13 & n.11. The record reflected a legitimate government objective in VMI's mission, a logical, rational, and non-pretextual basis for VMI's single-sex admissions policy as a means toward achieving that end, and no substantial evidence that appreciable numbers of young women in Virginia wanted a female VMI.

Second, the court below ignored the district court's finding that the differing developmental needs of women and men justify the provision of a single-sex adversative educational program to men but not to women. The VMI Board of Visitors had an ample basis for believing that the VMI adversative model would not be conducive to meeting the educational needs of women. The district court found, based upon uncontested expert testimony, that although women and men "have significant areas of developmental overlap, they also have differing developmental needs that are deep-seated." Pet. App. 82a. The adversative model employed at VMI is generally more effective for educating men than it is for educating most women, who tend to respond more favorably to a cooperative setting, according to the uncontested expert testimony. Pet. App. 83a.¹⁸

¹⁸ Although one of the government's expert witnesses testified that "the attributes of males and females in individual cases may diverge from these average tendencies [of each gender]," Pet. App. 83a (emphasis in original), the district court concluded that this testimony did not contradict the testimony of other experts that men, as a general rule, tend to benefit more from the adversative model. *Id.*

Third, the court ignored the assistance given by Virginia to women who wish to attend single-sex institutions through grants and loans to students attending the five private all-women's colleges, as well as other forms of assistance to those institutions. And Virginia's decentralized educational system accords autonomy to the board of visitors of each of its public colleges to adopt an all-women's admissions policy where demand or need exists. The Commonwealth of Virginia could reasonably have concluded that the absence of a female single-sex public college in Virginia could be remedied at any time by any of several institutions if sufficient demand for such programming were to develop.

Every educational institution will have unique characteristics. If a State must justify not providing precisely equal alternatives for women and men every time an effort is made to address the perceived needs of one gender, States will soon abandon any effort to provide for the particularized needs of its citizens, a result surely not required by the Equal Protection Clause.

B. The Court of Appeals' Decision Will Stifle Experimentation With Single-Sex Education.

The court of appeals' decision creates significant disincentives for States to offer single-sex public education, even as an impressive and growing body of scholarship has documented positive benefits from single-sex education. See Pet. App. 33a-34a, 84a.¹⁹ Several educators have advocated single-sex schools as the means to improve American education as well as to combat many of today's

¹⁹ See, e.g., Marlene A. Hamilton, *Performance Levels in Science and Other Subjects for Jamaican Adolescents Attending Single-Sex and Co-Educational High Schools*, 69 *Science Educ.* 535 (1985); Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 *J. Educ. Psychol.* 381 (1986); Cornelius Riordan, *Girls and Boys in School: Together or Separate?* 146-47 (1990); Daryl G. Smith, *Women's Colleges and Coed Colleges*, 61 *J. Higher Educ.* 181 (1990); M. Elizabeth Tidball & Vera Kistiakowsky, *Baccalaureate Origins of American Scientists and Scholars*, 193 *Science* 646 (1976).

youth-related social problems. See, e.g., Joseph A. Fernandez, *Tales Out of School* 80-82 (1993); William Kilpatrick, *Why Johnny Can't Tell Right From Wrong* 236-37 (1992); Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 *Harv. L. Rev.* 1741, 1743-44 & n.20 (1992) (citing educators' views) [hereinafter *Inner-City Single-Sex Schools*].

For example, numerous studies have found that many students perform better in a single-sex learning environment than in a coeducational setting. See, e.g., sources cited in *supra* note 19. These studies cite gender separation as a means to alleviate social pressures that distract certain young men and women from academic achievement. See, e.g., Pet. App. 85a. Studies have found that many students neglect their studies and avoid academic achievement in order to maintain their popularity among members of the opposite sex. See, e.g., Hamilton, *supra* note 19, at 546; Carroll Atkinson & Eugene T. Maleska, *The Story of Education* 438 (1965).

Single-sex schools may also provide a better environment for fostering positive social development in many students. See, e.g., Riordan, *supra* note 19, at 133. Although some educators have promoted coeducation based upon the theory that single-sex schools are detrimental to the social adjustment of students, see, e.g., Reginald R. Dale, *Mixed or Single-Sex School?* (1969), substantial scholarship suggests that the reverse may be true for some students.²⁰

²⁰ As one scholar observed,

[i]t is commonly assumed, both by educators and by laymen, that it is "better" for boys and girls to be in school together during adolescence, if not better for their academic performance, then at least better for their social development and adjustment. . . . [But] co-education in some high schools may be inimical to both academic achievement and social adjustment. The dichotomy forced between "life adjustment" and "academic emphasis" is a false one, for it forgets that most of the teenager's energy is not directed toward either one of these goals.

James S. Coleman, *The Adolescent Society* 50-51 (1961).

Thus, some educators have concluded that single-sex secondary schooling may be an effective means for counteracting the negative peer influences of what has long been termed the "adolescent subculture." See Coleman, *supra* note 20; Riordan, *supra* note 19, at 56-58, 138-46. And, at the college level, single-sex education has been found to enhance student assertiveness, intellectual self-esteem, interaction with faculty, career success and likelihood of obtaining a graduate degree. See, e.g., *id.* at 121, 124, 133; Smith, *supra* note 19, at 191-94; Tidball & Kistiakowsky, *supra* note 19, at 652.

Other recent studies have suggested that, for some students, coeducation may facilitate the development of stereotypical views of the roles of women and men. Cross-sex interaction may increase pressure for students to conform their behavior to traditional notions of gender roles. See Riordan, *supra* note 19, at 43-45, 56; Edward L. Vockell & Susan Lobonc, *Sex-Role Stereotyping By High School Females In Science*, 18 *J. Research In Science Teaching* 209 (1981). Thus, graduates from single-sex colleges may be more likely to choose a career normally associated with the other sex than students in coeducational colleges. Pet. App. 16a, 85a.

Single-sex education may be particularly valuable in a setting where discipline is stressed. For example, several educators have advocated experimentation with single-gender secondary schools to address the academic and social needs of urban youth. As one scholar recently observed,

the idea of all-male schools makes sense. The lives of inner-city youth are so much at risk . . . that radical measures are in order. And the principle behind this particular measure is a sound one. In fact, it is not especially radical. . . .

* * *

In communities with strong fathers at home and positive male role models in the neighborhood, coed schools . . . can do a decent job in educating and socializing boys. But where those

other conditions have broken down, the idea of all-male schools run by men makes sense. These might or might not be boarding schools. That would depend on the local situation. They don't have to be military schools, but—in this age of commitment to diversity—that option ought certainly to be entertained.

William Kilpatrick, *Why Johnny Can't Tell Right From Wrong*, at 234, 236 (1992).

None of these studies warrant abandoning coeducation, but they certainly justify appropriate experimentation by the States with different types of single-sex education. In fact, several school districts have sought to experiment with public single-sex educational programs on a limited basis.²¹ However, many such efforts have been impeded by charges either that public single-sex schools are *per se* unconstitutional under *Hogan*, or that, as suggested by the court below, single-sex education must be provided on a completely identical basis to both sexes, regardless of demand or need.

For example, in 1991, amicus Frank F. Hayden and other members of the Detroit Board of Education devised a proposal for three all-male academies to respond to the academic and social problems of young men, who had a dropout rate of 54%, a suspension rate of over 66%, and consistently scored lower on standardized reading and math tests and had greater disciplinary problems than young women. See *Inner-City Single-Sex Schools*, *supra*, at 1743.

²¹ A number of recent articles have reported successes in single-sex public education. See, e.g., Tom Bethell, *A Girls' School In Baltimore*, *The American Spectator*, Feb. 1993, at 17 (Laurence G. Paquin High School for Expectant Teenage Mothers); Michelle Healy, *Sisterhood Is Just the Start*, *USA Today*, Jan. 15, 1992, at 5A (all-girls Western High School in Baltimore, and Philadelphia High School For Girls); Kimberly McLarin, *All-Male Black Class Works Well In Philadelphia School*, *Richmond Times-Dispatch*, Jan. 17, 1993, at A2 (all-boys class at Stanton Elementary School); Paul Richter, *Bush Endorses All-Male Schools for Urban Blacks*, *L.A. Times*, Sept. 10, 1991, at 4A (single-sex classrooms in Detroit, New York, Baltimore, and Milwaukee).

Twelve hundred parents submitted applications for their children to be among the 536 who would be admitted to the three schools. See Ron Russell, *1,200 Want in at 3 All-Male Academies*, Detroit News, June 25, 1991, at 1A. However, operation of these academies was temporarily enjoined on the ground of alleged sex discrimination. See *Garrett v. Board of Educ.*, 775 F. Supp. 1044 (E.D. Mich. 1991) (preliminary injunction enjoining the operation of public all-boys secondary school). In response, the Detroit Board of Education reluctantly agreed to drop its proposal and settled the case, citing the cost of pursuing an appeal and the uncertainty of the outcome. See *Detroit Board of Education President Speaks On Male Academies Compromise*, PR Newswire Ass'n, Nov. 8, 1991, available on LEXIS, Nexis library, PRNews file.

The distortion of *Hogan* by the court below will add to the intimidating legal obstacles for school districts in experimenting with single-sex educational services as an option for the increasingly desperate educational needs of young people in our society. The net result will be that the single-sex education choice will be denied to lower income students and will be available only to those students who can afford a private education without public assistance.

C. The Court Of Appeals' Decision Will Have A Detrimental Effect On The Interests Of Women.

Although the decision below was ostensibly sought in order to protect the rights of women, the effect of the decision will be highly detrimental to women's interests. Single-sex higher education is considerably more popular among women than men. See Pet. App. 38a, 52a (noting that 64,000 women and 11,400 men are enrolled in single-sex colleges nationwide). See generally Anita Manning, *A '90s Resurgence For Women's Colleges*, USA Today, Feb. 16, 1993, at D1 (noting recent increased interest among women in attending single-sex colleges). Must public support for such institutions be predicated on equal efforts for men despite lesser demand, interest or need?

While it may be argued that an all-women's college should be given less equal protection scrutiny than an all-men's college because of the history of discrimination against women in higher education, the Court in *Hogan* determined that the standard of review should not vary according to the gender of the person being excluded. See *Hogan*, 458 U.S., at 723. Thus, the decision below is an unfortunate legal precedent that cannot easily be distinguished in the event that a male challenges the constitutionality of the nation's two remaining public all-women's colleges, or a currently coeducational institution that chooses to adopt an all-women's admissions policy.

In addition, for States such as Virginia that give substantial aid to private education, there is a latent but very real danger that the court of appeals' reasoning will be applied to public funding of *private* single-sex colleges. If VMI becomes coeducational as a result of the decision below, the overwhelming amount of public funding for single-sex higher education in Virginia would go to students attending all-women's colleges, which outnumber the single private all-men's college by a 5 to 1 ratio. Such disproportionate funding could make the all-women's colleges in Virginia vulnerable to constitutional challenge. Thus, the private women's colleges in Virginia have much to fear from the logic of the decision below.

Other governmental programs targeted at only one gender are also rendered constitutionally suspect by a decision that appears to require that all public services aimed at providing special assistance to women or men must be provided in precisely the same form and manner to both sexes regardless of the demand for those services. Some facilities supported by public funding (for example, shelters for battered women or rape crisis counseling centers) are normally provided exclusively for women or have institutional missions that are targeted primarily to meet women's needs. Under the reasoning of the decision below, the single-sex status of these facilities would be in jeopardy unless identical or comparable facilities were established for men. States would face the same equally unattractive

alternatives offered to Virginia by the decision below: (1) making the same facility equally available to both women and men, thereby decreasing the benefits of the facility for women; (2) establishing an equivalent facility for men irrespective of the demand or practicalities; or (3) ending operation of the facility. See Pet. App. 21a (listing similar alternatives for VMI).

CONCLUSION

VMI's petition for certiorari should be granted because the decision below distorts the reasoning of this Court in *Hogan* and erects potent and destructive barriers to experimentation and projects by States to respond to the individualized needs of their citizens.

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